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No. 81-469

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. BUSH, PETITIONER

v.

WILLIAM R. LUCAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a federal employee who contends that he was demoted in retaliation for the exercise of his First Amendment right of free speech, and who was subsequently reinstated with full back pay after administrative proceedings, may maintain a *Bivens*-type constitutional tort action for damages against his superior.

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OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. App. A) is reported at 647 F.2d 573. The order of this Court vacating the initial judgment of the court of appeals and remanding the case for further consideration in light of *Carlson* v. *Green*, 446 U.S. 14 (1980) (Pet. App. B), is reported at 446 U.S. 914. The initial opinion of the court of appeals (Pet. App. C) is reported at 598 F.2d 958. The opinions of the district court (Pet. App. D), and the Civil Service Commission (Pet. Apps. E, F, and G) are not reported.

JURISDICTION

The judgment of the court of appeals after remand was entered on June 12, 1981. The petition for a writ of certiorari was filed on September 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an aerospace engineer who has been employed for more than six years by the National Aeronautics and Space Administration (NASA) at the Marshall Space Flight Center in Alabama. Respondent is the Director of the Center. In the spring of 1975, following a reorganization of the civil service employees at the Center, petitioner made a number of well-publicized statements concerning his lack of meaningful work. Subsequently, in June 1975, respondent, in his capacity as Director, presided over a press conference commemorating the 15th anniversary of the Center. At the conclusion of the press conference, respondent was questioned about petitioner's allegations. He replied that he had had petitioner's statements investigated and that they had no basis in fact (Pet. Apps. cl-4 to cl-5; d-2 to d-3; e-2 to e-3).

In August 1975, a personnel action was initiated against petitioner to remove him from his position, and the matter was ultimately appealed to the respondent. Following a hearing, respondent notified petitioner that he would not be removed but that he was being reduced in grade from a GS-14 to a GS-12 position. Petitioner appealed this adverse action to the Civil Service Commission (Pet. Apps. cl-5 to cl-6; d-3 to d-4). In August 1976, the Commission's Regional Field Office rejected petitioner's claims (*id.* at e-1 to e-42), concluding that petitioner's public

"statements were misleading; that they generated an environment of sensationalism demeaning to the government, the agency, and its personnel at [the Center,] and that they impeded government efficiency and economy and adversely affected public confidence in the government service" (*id.* at e-31). In July 1978, the Commission's Appeals Review Board reopened, reconsidered, and reversed the adverse personnel determination (*id.* at f-1 to f-27). The Board found that although petitioner's comments were exaggerated, they were not motivated by malice and "were not wholly without truth" (*id.* at f-17 to f-18, f-25). The Board further determined that petitioner's First Amendment interests outweighed the proven disruption to the agency's operation in this case (*id.* at f-25). Accordingly, the Board recommended that petitioner be reinstated to his former grade and position and be awarded $30,724.40 in back pay (*id.* at f-26).[1]

2. Prior to the Board's decision, petitioner filed this suit in state court, claiming, *inter alia*, that respondent had conspired with others to demote petitioner in violation of his First Amendment rights.[2] Respondent removed the case to the United States District Court for the Northern District of Alabama, and moved for summary judgment. In February 1977, the district court granted respondent's motion

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[1] NASA fully accepted and effected this recommendation.

[2] Petitioner also contended that respondent's answer at the June 1975 press conference was defamatory. The court of appeals, however, has twice upheld the district court's ruling that respondent is entitled to absolute immunity from the defamation claim (Pet. Apps. a-3; cl-6 to cl-10), and petitioner does not seek further review by this Court of the dismissal of that claim. See *Barr* v. *Matteo*, 360 U.S. 564 (1959).

(Pet. Apps. cl-6; d-1 to d-17). The district court held that petitioner could not maintain a cause of action for damages because of the availability of administrative review of the adverse personnel action and because of the "importance of the government's interests in promoting the efficiency and integrity of its public services through its employees" (*id.* at d-14 to d-16).

3. The court of appeals affirmed (Pet. App. cl-1 to cl-14). Noting that this Court in *Davis* v. *Passman*, 442 U.S. 228 (1979), had found an implied constitutional tort remedy in large part because of the absence of any effective alternative remedy for the employee claimant there, the court of appeals concluded that an implied constitutional remedy is unnecessary for petitioner because the civil service statutes and regulations have provided him with an adequate remedy for his demotion (Pet. App. cl-11 to cl-14). Accordingly, the court of appeals held that petitioner was not entitled to seek a constitutional remedy in addition to the administrative remedy he had already successfully pursued (*id.* at cl-12 to cl-14).

4. Petitioner then filed a petition for a writ of certiorari in this Court. *Bush* v. *Lucas*, No. 79-1044. On April 28, 1980, the Court summarily granted the petition, vacated the judgment below, and remanded the case for further consideration in light of the intervening decision in *Carlson* v. *Green*, 446 U.S. 14 (1980) (Pet. App. B; 446 U.S. 914 (1980)).

5. On remand, the court of appeals reaffirmed the entry of summary judgment for the respondent (Pet. App. a-1 to a-12). The court of appeals noted that, under this Court's decision in *Carlson*, petitioner would be entitled to seek a constitutional damage remedy for retaliatory demotion unless either (1) "special factors are present which counsel hesitation

in the absence of affirmative action by Congress," or (2) Congress has "provided an alternative remedy" which it intended as an equally effective substitute for a *Bivens* remedy (Pet. App. a-5 to a-6). The court of appeals concluded that "the unique relationship between the Federal Government and its civil service employees" is a special factor "which counsels hesitation in inferring a *Bivens* remedy" in this context, and therefore found it unnecessary to consider the alternative remedy question (*id.* at a-6).

Citing *Sampson* v. *Murray*, 415 U.S. 61, 83 (1974), and *Arnett* v. *Kennedy*, 416 U.S. 134, 155 (1974) (opinion of Rehnquist, J.), the court of appeals noted that this Court has recognized that the federal government's relationship as an employer with its employees is fundamentally different from the government's role as sovereign over private citizens generally (Pet. App. a-6 to a-7). The court of appeals also observed that Congress has demonstrated its awareness of this special relationship by developing and continuing to improve a system of comprehensive statutory and administrative remedies for aggrieved civil servants (*id.* at a-8 to a-10). These considerations, the court held, serve to distinguish suits by federal civil service employees against their superiors from suits such as *Bivens* and *Carlson*, in which private citizens sought damages against agents of the government acting in its sovereign capacity (*id.* at a-10). Allowing a *Bivens* remedy in the governmental employment context, in the court of appeals' view, not only would undercut and interfere with Congress's painstaking efforts in this area of traditional governmental control and concern, but also would encourage aggrieved employees to bypass the statutory and administrative

remedies and would ultimately discourage Congress from continuing to improve federal employee grievance mechanisms (*id.* at a-10 to a-11). Therefore, the court held, in the absence of more explicit direction from Congress, a *Bivens* remedy should not be implied (*id.* at a-12).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any court of appeals. Accordingly, further review by this Court is unwarranted.

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court held that, at least in some circumstances, a person aggrieved by unconstitutional federal action may bring a suit based directly on the Constitution to recover damages for the injuries suffered. In *Carlson* v. *Green*, 446 U.S. 14 (1980), however, the Court declared that a *Bivens* remedy will not be available in either one of two situations: (1) where there are "special factors counselling hesitation" in implying a constitutional remedy in the absence of affirmative action by Congress, or (2) where Congress has provided an equally effective alternative remedy under circumstances suggesting that it is meant as a substitute for a constitutional remedy. 446 U.S. at 18-19. Under either of these criteria, a *Bivens* remedy for petitioner is not appropriate and his suit was correctly dismissed.

1. The court of appeals correctly held that special factors present in this case preclude the availability of a *Bivens* remedy. Although this Court has not yet had occasion affirmatively to define "special

factors,"[3] it has often recognized the special nature of the federal government's relationship with its own civil service employees. See, *e.g.*, *Sampson* v. *Murray*, *supra*, 415 U.S. at 83 (citation omitted) (noting the "well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs' "); *Arnett* v. *Kennedy*, *supra*, 416 U.S. at 168 ("the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs" (opinion of Powell, J.)). Indeed, as the court of appeals noted, this Court has specifically held that the special considerations inherent in the public employment relationship serve to limit the exercise of the First Amendment right of free speech by public employees when the exercise of that right interferes with the efficiency and integrity of the government's functioning. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).[4]

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[3] The Court found no special factors present in either *Bivens* (403 U.S. at 396-397) or *Carlson* (446 U.S. at 19), and the concerns raised by the claim in *Davis* v. *Passman*, *supra*, were held to be "coextensive with the protections afforded [the defendant congressman] by the Speech or Debate Clause." 442 U.S. at 246.

[4] That limitation is especially significant here, in view of petitioner's contention that the improper personnel action was a retaliation for his exercise of First Amendment free speech rights. When the district court applied the *Pickering* analysis (balancing the employee's right to free speech against the public interest in the employer's efficient conduct of public business), it concluded that petitioner had not shown a constitutional deprivation (Pet. App. d-16). If this Court agrees with that conclusion, there is no need to decide whether a *Bivens* remedy would be available here. See *Parratt* v. *Taylor*, No. 79-1734 (May 18, 1981).

Moreover, Congress has long been active in this area. Consistent with its responsibility to provide for effective and efficient federal management, Congress has diligently attempted to create extensive substantive and procedural safeguards for federal employee rights, as well as comprehensive mechanisms for the resolution of employee grievances.[5] Petitioner has had the full advantage of those remedies: the adverse action was rescinded and he was reinstated to his former position with full back pay.[6] The court of appeals quite properly concluded that the availability of an additional remedy, based upon

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[5] Congressional efforts began with the Pendleton Act of 1883 ch. 27, 22 Stat. 403, and continued through the Lloyd-LaFollette Act of 1912, ch. 389, Section 6, 37 Stat. 555; the Back Pay Act of 1948, ch. 447, 62 Stat. 354; and the Back Pay Act of 1966, 5 U.S.C. 5596 (under which petitioner ultimately obtained his administrative relief in this case). See also 5 C.F.R. Part 752, Subparts C and D, and Parts 754 and 772 (1979). Most recently, Congress's efforts in this area have culminated in the enactment of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1135-1144, 5 U.S.C. (Supp. IV) 7511-7703). (That statute was enacted after petitioner filed this suit.)

[6] In view of that monetary and equitable relief, together with the Civil Service Commission's acknowledgement that petitioner's free expression rights under the First Amendment outweighed any disruption to the agency's work caused by his comments, it is not apparent what further relief petitioner could obtain, even if he were permitted to pursue his constitutional cause of action. Cf. *Bivens* v. *Six Unknown Named Agents*, *supra*, 403 U.S. at 406-409 (Harlan, J., concurring); *Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 413 (1979); *Mt. Healthy City Board of Education* v. *Doyle*, 429 U.S. 274, 277 (1977). We further note that respondent is in any event entitled to assert at least a qualified immunity as a defense to petitioner's claim for damages. See *Butz* v. *Economou*, 438 U.S. 478, 507-508 & n.35 (1978).

the Constitution, for alleged improper federal personnel actions would constitute an unwarranted interference with the government's ability to solve its internal personnel problems within the comprehensive statutory framework. The unique considerations present in the federal employment context therefore constitute "special factors" that counsel against implying a constitutional remedy for federal employee grievances, and mandate the dismissal in this case. Accord, *Bishop* v. *Tice*, 622 F.2d 349, 357 (8th Cir. 1980); *Purtill* v. *Harris*, 658 F.2d 134, 137-138 (3d Cir. 1981).

2. Although the court of appeals found it unnecessary to address the "alternative remedy," or preemption, prong of the *Carlson* doctrine, it is clear that the decision below could be upheld on that basis as well.

A defendant need not show that Congress recited any "magic words" to demonstrate that Congress meant to preempt a *Bivens* remedy or to provide an equally effective substitute remedy; rather, the inquiry is limited to a determination of congressional intent. *Carlson* v. *Green*, *supra*, 446 U.S. at 19 n.5; *Purtill* v. *Harris*, *supra*, 658 F.2d at 137-138 (holding that in Section 15 of the Age Discrimination in Employment Act, 29 U.S.C. 633a, Congress intended to preempt a *Bivens* remedy for claims of age discrimination in federal employment). In making this determination in other contexts, the Court has looked both to the legislative history and to the structure of the overall statutory scheme. *Carlson* v. *Green*, *supra*; *Brown* v. *GSA*, 425 U.S. 820 (1976). Thus in *Carlson*, the Court was persuaded by explicit language in the legislative history that the Tort Claims Act Amendments at issue were not intended to sup-

plant *Bivens* relief. In *Brown*, both the legislative history and the "balance, completeness and structural integrity" of the legislative remedy persuaded the Court that Title VII of the Civil Rights Act of 1964 was intended to be the exclusive remedy for federal employees asserting claims of race discrimination in federal employment. 425 U.S. at 828, 832.

No language in the civil service statutes or regulations or in their legislative history expressly preserves a *Bivens* remedy for the redress of improper personnel actions. On the contrary, the legislative history of the Back Pay Act of 1966, 5 U.S.C. 5596 (applicable at the time petitioner successfully pursued his administrative remedy), shows that Congress believed that it was providing a complete remedy in the form of extensive procedural protections, reinstatement, and back pay for employees subjected to unjustified adverse personnel actions.[7] Moreover, the very detail and comprehensiveness of Congress's continuous efforts to provide civil service protections and remedies, together with the provisions for limited judicial review,[8] manifest Congress's continuing expectation that the administrative process is to provide complete relief and is not to be bypassed or undermined by employees' suits brought against their superiors directly under the Constitution. *Bishop* v. *Tice, supra.*

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[7] See S. Rep. No. 1062, 89th Cong., 2d Sess. 1 (1966), which states that the Back Pay Act of 1966 was intended to be "perfecting legislation" to round out and fill in the gaps in previous legislative efforts, and to "put[] the employee in the same position he would have been in had the unjustified or erroneous personnel action not taken place."

[8] See, *e.g.*, 5 U.S.C. 706; 5 U.S.C. (Supp. IV) 7703.

3. The decisions of other courts of appeals in *Bivens* suits arising from federal employee adverse actions are in accord with this decision, on the basis of one or both of the *Carlson* exceptions. *Purtill* v. *Harris*, *supra* (special factors and alternative remedy); *Bishop* v. *Tice*, *supra* (special factors). Only one court of appeals has allowed a federal employee to pursue a *Bivens* remedy for an alleged wrongful personnel action. *Sonntag* v. *Dooley*, 650 F.2d 904 (7th Cir. 1981).[9] Petitioner contends that in view of the different result in *Sonntag*, there is a conflict among the circuits that this Court must resolve (Pet. 31-35). The suggested conflict is more apparent than real, however, and does not warrant certiorari.

The plaintiff in *Sonntag* contended that her superiors and fellow employees had harassed her to the point that her health had deteriorated and she was forced to retire. In concluding that she was entitled to pursue a *Bivens* remedy, the Seventh Circuit touched on the "special factors" question only in passing, and failed to consider whether the federal employment relationship and legislative remedies could be considered special factors counselling

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[9] In *Shewmaker* v. *Minchew*, No. 80-2370 (D.C. Cir. Oct. 14, 1981), the panel stated in dictum that it declined to adopt the view of the district court that the appellant, a discharged federal employee, had "no private right of action under the Fifth Amendment because an alternative remedy is available through administrative procedures" (slip op. 3). Because the panel agreed that the appellant had failed adequately to allege any "liberty" or "property" interest, however, it did not "apply the *Carlson* v. *Green* standards to the remedies available to appellant" to determine if a *Bivens* remedy should be made available (*ibid.*). The decision thus creates no conflict on the issue presented in this case.

against implying a *Bivens* remedy. 650 F.2d at 907.[10] The *Sonntag* decision was, instead, principally influenced by the Seventh Circuit's belief that the plaintiff's "coerced retirement" claim was irremediable under the civil service laws and that therefore she had no alternative remedy available. *Ibid.* In fact, the *Sonntag* court's premise was flatly wrong;[11] but what is more significant for present purposes, its conclusion that a *Bivens* remedy must be implied in the circumstances as the court understood them to be in that case would have no application in a case such as this, where administrative redress is not only fully available to the employee, but has been successfully pursued. Thus, *Sonntag* does not present a conflict requiring this Court's resolution.

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[10] The court merely observed that the defendants there did not have " 'such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate,' " and that the qualified immunity available in a *Bivens* suit would adequately protect them from being inhibited in the performance of their official duties by having to defend the suit. *Ibid.*, *quoting Carlson* v. *Green*, *supra*, 446 U.S. at 19.

[11] Ample judicial authority, administrative practice, and unequivocal opinions of the Merit Systems Protection Board make plain the unquestioned authority of the MSPB (and before that, the Civil Service Commission) to consider "coerced retirement" claims like Sonntag's. See, *e.g.*, *Gratehouse* v. *United States*, 512 F.2d 1104, 1108, 1111-1112 (Ct. Cl. 1975); *Dabney* v. *Freeman*, 358 F.2d 533, 535 (D.C. Cir. 1965); *Bishop* v. *Tice*, *supra*; *Murray* v. *Defense Mapping Agency*, Dkt. No. DA 075299007 (MSPB Jan. 17, 1980). See 5 U.S.C. (Supp. IV) 7512(1) and 7513(d).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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